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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CITY OF KANSAS CITY, MISSOURI,
Petitioner,

vs.

ELVIS TOLEFREE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER RESPONDENT'S TITLE VII ACTION IN FEDERAL COURT IS BARRED BY THE CLAIM PRECLUSIVE EFFECT OF AN ADMINISTRATIVE BOARD'S DECISION THAT RESPONDENT WAS TERMINATED FOR JUST CAUSE WHICH WAS JUDICIALLY REVIEWED AND AFFIRMED BY A MISSOURI COURT.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CITY OF KANSAS CITY, MISSOURI,
Petitioner,

vs.

ELVIS TOLEFREE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPINIONS BELOW

April 2, 1991, decision of the district court granted summary judgment to petitioner (defendant), case number 90-0201-CV-W-5 (not reported).

May 19, 1992, decision of the Eighth Circuit Court of Appeals reversed and remanded to district court, No. 91-2002, reported as Elvis Tolefree v. City of Kansas City, Missouri, 964 F.2d 803 (1992); opinion vacated July 9, 1992 at 975 F.2d 434 (1992).

December 2, 1992, decision of the Eighth Circuit issued after reconsideration by the panel, reversed and remanded to district court, No. 91-2002, reported as Elvis Tolefree v. City of Kansas City, Missouri, 980 F.2d 1171 (1992).

JURISDICTION

Petitioner seeks review of the Eighth Circuit's December 2, 1992 decision which reversed and remanded the district court's decision. Rehearing was denied by the Eighth Circuit on February 25, 1993. The statute that confers jurisdiction on this Court to review the Eighth Circuit's decision is 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provision, which is set forth in Appendix D:

City of Kansas City, Missouri Charter Section 125.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

Respondent Elvis Tolefree filed this employment discrimination action in the United States District Court for the Western District on February 27, 1990. Jurisdiction in the district court was based on 28 U.S.C. Sections 1331, 1343. He alleged that he had been terminated from his employment with the City of Kansas City, Missouri in violation of 42 U.S.C. Section 2000e, et seq., (Title VII),[1] and the Missouri Human Rights Act, Section 213.010, et seq., RSMo (1986). On April 2, 1991, the Honorable Scott O. Wright granted petitioner City of

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[1]Tolefree alleged that he was discharged in retaliation for filing a previous charge of discrimination, which would be a violation of 42 U.S.C. Section 2000e-3(a).

Kansas City, Missouri (defendant) summary judgment, finding (1) that Tolefree's Title VII and Chapter 213, RSMo claims were barred by the collateral estoppel effect of a prior state court judgment upholding plaintiff's termination and (2) that Tolefree's Chapter 213, RSMo action was additionally barred because it was not brought within the two year statute of limitations under Section 213.111, RSMo (1986).

Tolefree appealed the district court's decision to the Eighth Circuit Court of Appeals, challenging the district court's holding regarding collateral estoppel. (Tolefree did not appeal the statute of limitations ruling.) The City argued on appeal that the district court was correct in holding that Tolefree's claims were barred under the doctrine of collateral estoppel (issue preclusion), but also argued that the decision could additionally be upheld under the doctrine of res judicata (claim preclusion). The Eighth Circuit rejected both arguments and on May 19, 1992, reversed and remanded the case to the district court. Upon the City's petition, the Eighth Circuit reconsidered the matter and issued a revised opinion on December 2, 1992, again reversing and remanding. The City's subsequent petition for rehearing was denied.

The City petitions this Court for a writ of certiorari because the Eighth Circuit's decision on the res judicata question[2] is in conflict with a Seventh Circuit decision with nearly identical facts and is contrary to several similar cases from other circuits and from this Court. Additionally, the question presented is an important question of law on which this Court has previously reserved judgment.

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[2]The res judicata issue is discussed in section III of the court's opinion.

FACTS

Respondent, Elvis N. Tolefree, was employed by the City of Kansas City, Missouri, as a fire fighter until he was discharged on December 6, 1986. The report of separation prepared by the City showed the termination to be based on Tolefree's lack of diligence and poor quality work.

Following Tolefree's termination, he sought review by the City's Personnel Board. The City Charter[3] which created the Personnel Board provides for a complete adversarial hearing before the Board. (Charter Section 125, set forth in Appendix D) The Board may inquire into all the facts and circumstances pertaining to the discharge to determine whether the employee was "wrongfully discharged." Testimony is under oath. Subpoenas for witnesses, and subpoenas duces tecum for books and papers may be issued. The Board may reinstate an employee to a position, and may order that the employee receive any appropriate back pay. Other orders needed to effectuate the purposes of the Charter may be issued. Plaintiff indicated on the request for a hearing before the Personnel Board that "I feel that the termination is unjustified." Tolefree was represented by an attorney at the hearing, held on two days, January 13, 1987, and February 10, 1987. In Tolefree's presentation to the Personnel Board he disputed the characterization by the City's witnesses that his work was unsatisfactory. He did not claim that his discharge had been discriminatory.

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[3]The City of Kansas City, Missouri is a constitutional charter city with home rule governance, pursuant to Missouri Constitution, Article VI, Sections 19, 19(a). Charter provisions have the same effect as state statutes, so long as the Charter provisions do not conflict with state law. Bueche v. Kansas City, 492 S.W.2d 835, 842 (Mo. banc 1973).

Following the hearing, the Personnel Board made the following findings of fact:

> The Board finds that the Appellant had been employed since August 17, 1978, by Respondent and while working as a Fire Fighter in the Fire Fighting Division of the Fire Department for Respondent, he was terminated effective December 9, 1986, for receiving two consecutive unsatisfactory ratings on Employee Performance Reports, the first one on (sic) annual report followed by a special rating in 90 days; that Appellant produced poor quality work and lacked diligence in work which resulted in the first rating and failed to improve resulting in the second rating. Appellant [plaintiff] stated he believed he received inadequate training and that others didn't understand him but produced no evidence thereof. Appellant admitted he had "problems with the system."

The Board concluded that Tolefree had not been wrongfully discharged.[4]

Tolefree appealed the decision to the City Manager, for a review of the record. The Board's decision was upheld by the City Manager.

Tolefree, again through an attorney, appealed the Board's decision on July 2, 1987, to the Jackson County, Missouri, Circuit Court, under the provisions of the Missouri Administrative Procedure and Review Act. Chapter 536, RSMo (1986 and Supp. 1992) The action was known as Elvis N. Tolefree v. Personnel Board of the City of Kansas City, Missouri, No. CV87-15821. In his petition for review, Tolefree complained that his counsel had been ineffective, and that the Board's

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[4]The Board's decision is set forth in Appendix E.

procedure and decision had been unlawful, arbitrary, capricious and unreasonable.

On October 29, 1987, the Jackson County Circuit Court issued a decision upholding the decision of the Personnel Board.[5] The court noted that its decision was made after its review of the transcript, all exhibits, and after hearing argument from the parties. Plaintiff did not further appeal the court's decision.

While the personnel board case was pending, Tolefree filed a charge of discriminatory discharge with the Kansas City Human Relations Department, which was an agency certified to process discrimination charges by the Equal Employment Opportunity Commission as a local fair employment practice agency under 29 C.F.R. Section 1601.80. Because Tolefree had been a City employee and the Human Relations Department is a City department, the Department declined to process the charge and deferred it to the EEOC, pursuant to a worksharing agreement. The EEOC investigated the charge and issued a finding of no probable cause and a right to sue letter on November 27, 1989. Tolefree was represented by counsel throughout the EEOC proceedings. Tolefree then filed this Title VII action on February 27, 1990, alleging that he was terminated in retaliation for filing a prior EEOC charge.

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[5]The court's decision is set forth in Appendix E.

ARGUMENT

I.

The Eighth Circuit decision in the present case is in conflict in all respects with a 1991 Seventh Circuit decision.

The Eighth Circuit ruled in this case that Tolefree's prior state court challenge of his termination would not preclude his federal challenge of his termination under Title VII. The Eighth Circuit reasoned that Tolefree's prior suit was not a "claim" but was "nothing more than steps in an administrative challenge of his dismissal," and therefore would not be given claim preclusive effect.

The facts and procedural history in the present case are nearly identical to those in Pirela v. Village of North Aurora, 935 F.2d 909 (7th Cir.), cert. denied, 116 L.Ed. 2d 612, 112 S.Ct. 587 (1991); only the result is different. The plaintiff in Pirela, Pablo F. Pirela, had filed an EEOC charge in January 1986, complaining that he had been suspended and denied promotions because of his race. In April 1986, Pirela was discharged after a hearing before the Board of Fire and Police commissioners of North Aurora. Pirela did not allege that his termination was discriminatory before the Board. In June 1986 Pirela amended his EEOC charge to include an allegation of discriminatory discharge. Pirela also filed a complaint for administrative review of the Fire and Police Board's decision in the Illinois Circuit Court. He argued in his state court suit that the Board's decision was against the manifest weight of the evidence, but did not allege race discrimination. The circuit court affirmed the Board's decision in March 1987. Pirela received his right to sue letter from the EEOC in March 1987 and subsequently filed a federal suit alleging discriminatory promotion, salary, suspension and

discharge procedure under Title VII, 42 U.S.C. Section 2000e et seq.[6] The federal district court dismissed the Title VII suit and the Seventh Circuit affirmed, holding that Pirela's Title VII discriminatory discharge claim was barred because of the res judicata effect of the prior state administrative proceedings. 935 F.2d at 912. The court analyzed the two suits under the "transactional" approach and the "same evidence" approach, and determined that the two lawsuits involved the same cause of action under either approach because they both arose out of the same "transaction" (the discharge) and because the same evidence would be used to prove his Title VII claim as would have been used in a discrimination defense to his state proceedings, had he raised such a defense. Therefore, res judicata barred the second suit.

The present case presents a virtually identical factual and procedural history. Tolefree filed an EEOC charge before his discharge, complaining that he had received an unsatisfactory service rating in retaliation for his filing a previous discrimination charge. After his discharge, Tolefree amended the charge to include allegations of a retaliatory discharge. While the EEOC complaint was pending, he requested and received a hearing before the Kansas City Personnel Board. He challenged the Board's decision in a Missouri Circuit Court, but did not allege discrimination or retaliation; he only disputed the procedure used by the Board and the facts which supported the Board's decision. Tolefree's state court action cannot be distinguished from Pirela's state court action. The timing of Tolefree's EEOC charge and subsequent Title VII suit similarly cannot be

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[6]He also alleged that the Village violated 42 U.S.C. Section 1981, and the Equal Pay Act, 29 U.S.C. Section 201 et seq.

distinguished from Pirela's. Therefore the Seventh Circuit's decision in Pirela which gives preclusive effect to the state administrative proceedings is in direct conflict with the Eighth Circuit's decision in the present case which does not give the state court decision preclusive effect.

In determining whether a state court decision will be given preclusive effect, the federal courts must look to the relevant state law of res judicata pursuant to the Full Faith and Credit Act, 28 U.S.C. Section 1738. Allen v. McCurry, 449 U.S.90, 96 (1980). In Pirela, the court used Illinois res judicata law. Illinois courts use either the "transactional" approach -- if the two suits arise out of the same transaction, resolution of the first will bar the second -- or the "same evidence" approach -- if the same evidence would sustain both suits, the second is precluded by the first. See Pirela, 935 F.2d at 912. Missouri courts also use either the "transactional" or the "same evidence" approach. Burke v. Doerflinger, 663 S.W.2d 405, 407 (Mo. App. 1983). Therefore, the present case cannot be distinguished from Pirela on the basis of any difference in the underlying state law.

Clearly, the Seventh Circuit's decision in Pirela is contrary to the Eighth Circuit's decision in this case and only the Supreme Court can resolve the conflict.

II.

The Eighth Circuit's holding that a judicially reviewed administrative decision is not a claim and is therefore not entitled to claim preclusive effect is contrary to cases from this Court and from other circuit courts of appeals.

The Eighth Circuit dismissed Tolefree's previous state court case as mere "steps in an administrative challenge of his dismissal." What the court referred to as "steps" was a court review and affirmance of the administrative decision. The Eighth Circuit held that in that prior case Tolefree did not assert a claim, but rather was "merely seeking to have his dismissal reversed."[7] This holding that a judicially reviewed administrative decision is not entitled to preclusive effect is in conflict with numerous decisions of other circuit courts of appeals and of the Supreme Court.

A state court affirmance of an administrative decision is in fact a state court decision regardless of the fact that the state court did not review the matter de novo, and that decision must be given full faith and credit in accordance with Section 1738. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480 n.21 (1982) ("It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect . . .

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[7]Missouri courts have defined the word "claim" as follows: "The word 'claim' does not refer to the form of the action but to the underlying facts combined with the law giving a party a right to a remedy of one form or another based on the claim" Dunn v. Pickard, 284 S.W.2d 6, 10 (Mo. App. 1955). In determining whether a second suit will be precluded by a first under res judicata, the courts analyze whether the two suits arise out of the same "transaction," rather than the same "claim." Id. "Transaction" is broadly construed to include all the facts and circumstances which constitute the foundation of a claim, and out of which the injury complained of arose. Id.

There is no requirement that judicial review must be de novo if it is to be preclusive.") The Eighth Circuit's holding on this issue is therefore clearly contrary to Kremer.

Other circuits have uniformly given such state court affirmances claim preclusive effect. The first circuit did so in Mulrain v. Board of Selectmen of the Town of Leicester, 944 F.2d 23, 24 (1st Cir. 1991) (Massachusetts court affirmance of Civil Service commission decision barred, under res judicata, subsequent Section 1983 action). The Sixth Circuit gave claim preclusive effect to an Ohio court affirmance of a Youngstown Civil Service Commission decision in a subsequent Section 1983 action in Gutierrez v. Lynch, 826 F.2d 1534, 1537-38 (6th Cir. 1987). The Sixth Circuit also gave res judicata effect to an Ohio court affirmance of an Ohio Environmental Protection Agency order in a subsequent Section 1983 action centering on the same factual situation in City of Canton, Ohio v. Maynard, 766 F.2d 236, 238-39 (6th Cir. 1985). As discussed in Part I of this Argument, the Seventh Circuit gave claim preclusive effect to an Illinois court affirmance of a local police board decision in Pirela. Accord, Lolling v. Patterson, 966 F.2d 230, 235 (7th Cir. 1992); Welch v. Johnson, 907 F.2d 714, 720-23 (7th Cir. 1990); Button v. Harden, 814 F2d 382, 384 (7th Cir. 1987). The Ninth Circuit gave claim preclusive effect to a California court affirmance of a City of Santa Ana Personnel Board decision in a subsequent case brought under Title VII and 42 U.S.C. Sections 1981, 1983, 1985 and 1986, in Sanchez v. City of Santa Ana, 936 F.2d 1027, 1035-36 (9th cir. 1990), cert. denied, 112 S.Ct. 417 (1991).

The Eighth Circuit's decision in the present case clearly cannot be reconciled with Kremer or with the above cited circuit court decisions.

III.

The Eighth Circuit's holding that Tolefree's EEOC charge excused his failure to raise the issue of retaliation before the Personnel Board conflicts with decisions of other circuits.

The Eighth Circuit also justified its decision on the basis that Tolefree was pursuing his claims with the EEOC[8] simultaneously with his Personnel Board and state court actions and that the filing of the EEOC charge excused him from raising the discrimination allegations in the state proceedings. This reasoning is contrary to the Second Circuit's decision in Woods v. Dunlop Tire Corp., 972 F.2d 36 (2nd Cir. 1992). In Woods, the plaintiff had filed charges with the EEOC and with the State Division of Human Rights, alleging that she had been terminated because of her race and/or sex. While the EEOC charge was pending, she filed suit under the Labor Management Relations Act (LMRA), alleging that she had been fired in violation of her collective bargaining agreement. After the LMRA suit had been dismissed and after receiving a right to sue letter from the EEOC, plaintiff filed a Title VII action. Plaintiff argued that her LMRA suit should not bar her subsequent Title VII suit, even though they both involved the same transaction, their termination, because her EEOC charge was still pending during the first suit, and she had a right to full administrative review before filing her Title VII action. The Second Circuit rejected that argument and held that the LMRA suit barred the Title VII suit under res judicata.

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[8]The court actually states that he was pursing the claim before the Human Relations Department, but, as explained in the **FACTS** section of the **STATEMENT OF THE CASE**, the EEOC actually processed the charge.

Id. at 38-40. The court reasoned that the plaintiff had two possible courses of action to avoid this result; she could have filed her LMRA suit, requested a stay until the EEOC proceedings were resolved, and then later joined a Title VII claim, or she could have requested a right to sue letter on her EEOC charge before filing the LMRA suit, or while it was pending, and then joined the Title VII claim. Because she did not take either of these steps, her Title VII claim was barred. Woods clearly conflicts with the Eighth Circuit's holding in the present case that the pending EEOC charge excuses Tolefree from raising the discrimination allegations before the Personnel Board or in the state court review of the Personnel Board's decision.[9] This holding also conflicts with Pirela v. Village of North Aurora, 935 F.2d 909 (7th Cir.) cert. denied, 116 L.Ed.2d 612, 112 S.Ct. 587 (1991) (EEOC charge was pending during state court proceedings that were held to bar subsequent Title VII suit) and with Miller v. United States Postal Service, 825 F.2d 62, 64 (5th cir. 1987) (failure to raise Rehabilitative Act claims during his Title VII suit barred later Rehabilitative Act suit, despite fact that plaintiff had not exhausted his administrative remedies

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[9]Although Tolefree could not have raised new issues on his appeal to the Missouri Circuit Court in his administrative review count, he could have raised the allegations for the first time at the circuit court level by joining a Title VII action as a separate count in his petition for review. See, e.g., *Blackwell v. City of St. Louis*, 778 S.W.2d 711 (Mo. App. 1989), cert. denied, 494 U.S. 1067 (1990) (§ 1983 claim joined with Chapter 536 petition for review). The circuit court would have been fully capable of adjudicating Tolefree's Title VII claim. See Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) (state courts have concurrent jurisdiction with federal courts over Title VII actions). Tolefree had two separate opportunities to raise his Title VII allegations during the course of the state court proceedings, at the administrative level and on appeal, and he failed to avail himself of either opportunity. He also could have bypassed his circuit court appeal (or bypassed the Personnel Board altogether) if he wanted his claim heard in federal court.

under the Rehabilitative Act when he filed his Title VII suit). Thus the Eighth Circuit's holding that because of the pending EEOC charge the judicially reviewed personnel board decision will not have res judicata effect conflicts with decisions from three other circuits, and this would be an appropriate case in which to resolve the conflict.

IV.

This Court has not decided the important question of whether a judicially reviewed state administrative decision will preclude under res judicata a subsequent federal Title VII action.

This Court has held that state administrative decisions that have not been reviewed by a state court will not bar a subsequent Title VII action under res judicata, because such unreviewed administrative decisions are not subject to the mandate of Section 1738. University of Tennessee v. Elliott, 478 U.S. 788, 796 (1986). Conversely, the Elliott Court held that such unreviewed administrative decisions will preclude subsequent federal employment discrimination cases brought under 42 U.S.C. Section 1983. Id. at 799.

This Court has held that judicially reviewed administrative decisions will have issue preclusive effect in subsequent Title VII actions under the doctrine of collateral estoppel. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982).[10] The Court in Kremer noted that such reviewed administrative decisions might also bar a Title VII action under res judicata (claim preclusion), but left that question for another case. Id. at 481 n.22. The present case affords the Court the opportunity to decide this important issue.

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[10]This Court has stated in a Section 1983 case that "[i]t is difficult to see how the policy concerns underlying Section 1983 would justify a distinction between the issue preclusive and claim preclusive effect of state court judgments." Migra v. Warren City School District Bd. of Education, 465 U.S. 75, 83 (1984).

CONCLUSION

The petitioner City of Kansas City, Missouri requests that the Court issue its writ of certiorari in this present case to resolve the conflicts that the present decision presents with other circuit court of appeals decisions and with prior Supreme Court decisions. This would be an appropriate case for this Court to decide the important question of whether judicially reviewed administrative decisions will have claim preclusive effect in subsequent Title VII actions, a question on which this Court has previously reserved judgment.

Respectfully submitted,

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APPENDIX A

ELVIS TOLEFREE,
Appellant,

v.

CITY OF KANSAS CITY, MISSOURI,
Appellee.

No. 91-2002

United States District Court,
For the Eighth Circuit
December 2, 1992

Elvis Tolefree appeals from the district court's order granting summary judgment to the City of Kansas City, Missouri ("the City") in Tolefree's employment discrimination action. We reverse and remand.

I.

The City hired Tolefree as a fire fighter in August 1978. Tolefree's supervisors reviewed his work annually on an "Employee Performance Report" form, which required the supervisor to rate the employee's quality of work, work output, work habits, safety, personal relations, adaptability, and supervisory skills, and to give the employee a "general evaluation" rating.[1] Tolefree's "general evaluation" ratings were as follows:

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[1]From 1979 until 1981, the possible ratings in each category were: outstanding, above average, average, below average, and unsatisfactory. In 1982, the ratings changed to optimal, better, satisfactory, and unsatistactory.

August	1979	Average
August	1980	Average
July	1981	Average
August	1982	Satisfactory
July	1983	Unsatisfactory
March	1984	Satisfactory
July	1984	Satisfactory
July	1985	Satisfactory
August	1986	Unsatisfactory
November	1986	Unsatisfactory

In April 1984, Tolefree filed a charge of race discrimination with the City's Department of Human Relations. He alleged that because he is an African-American, he was denied training as an extra driver, subjected to derogatory remarks, instructed to remain at his rig during fires, and sanctioned for insubordination. The disposition of this charge is not clear from the record.

In September 1986, Tolefree again filed a charge against the City with the City's Department of Human Relations and with the Equal Employment Opportunity Commission (EEOC). His 1986 charge asserted that his August 1986 "unsatisfactory" rating was in retaliation for filing the 1984 discrimination charge. After Tolefree was again rated "unsatisfactory" in November 1986, the City discharged him effective December 9, 1986, citing lack of diligence and poor work quality. Tolefree then amended his September 1986 charge to allege that his discharge was also retaliatory.

At Tolefree's request, the City's Personnel Appeals Board ("the Board") reviewed the propriety of his discharge. The Board held a hearing, at which Tolefree was represented by his union's attorney. The sole issue at the hearing was whether the City's dismissal of Tolefree was justifiable. Neither party raised the issues of racial discrimination and retaliation. In a brief

written decision, the Board held that Tolefree was properly terminated under Section 16.5 of the Personnel Rules and Regulations, which stated that "[a]ny employee receiving a rating of UNSATISFACTORY for two (2) consecutive times shall be dismissed by the appointing authority for unsatisfactory service." The Board found that "although [Tolefree] appears to be an intelligent articulate person, he has allowed his own values and concepts of his job to create performance problems in his dealing with a structured fire fighting system accepted by the Fire Department, the Union and the management."

In accordance with internal administrative procedures, Tolefree next appealed to the City Manager, who concluded that the Board's decision was supported by the record. Tolefree then filed a petition for review with the state circuit court in Jackson County. In an October 1987 order, the state court summarily affirmed the Personnel Board and the City Manager without opinion. Tolefree did not appeal the state court's order.

After receiving a right to sue letter from the EEOC in November 1989 on his 1986 charge against the City, Tolefree filed this action in the district court in February 1990. His complaint alleged racial discrimination and retaliation in violation of Title VII, 42 U.S.C. Section 2000e-2 and the Missouri Human Rights Act, Mo. Rev. Stat Secs. 213.055, et. seq. One year later, the City moved for summary judgment, arguing that the prior state court order barred Tolefree's claims under the doctrine of collateral estoppel. The district court agreed, relying on our opinion in Swapshire v. Baer, 865 F.2d 948 (8th Cir. 1989), and on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The district court noted that an employer will prevail in a Title VII action if it can prove that it would have discharged the plaintiff regardless of his race. Price Waterhouse, 490 U.S. at 242. The court concluded that:

> [a]s the prior litigation determined that plaintiff was terminated for legitimate nondiscriminatory reasons, it is this finding which plaintiff is estopped from denying. Because it is an essential element of plaintiff's case to prove that defendant terminated plaintiff for other than a legitimate nondiscriminatory reason summary judgment must be entered on this claim.

The court reached the same result with respect to Tolefree's claim of retaliatory discharge.[2]

II.

Federal courts must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." Kremer v. Chemical Const. Corp., 456 U.S. 461, 466 (1982). Under Missouri law, Tolefree would be collaterally estopped from pursuing his Title VII claim if four conditions were met. First, the issue decided in the prior adjudication must be identical to the issue presented by his Title VII action. Second, the prior adjudication must have resulted in a judgment on the merits. Third, Tolefree must have been a party or in privity with a party to the prior adjudication. Fourth, Tolefree must have had a full and fair opportunity to litigate the issue in the prior suit. Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 719 (Mo. 1979).

There is no question that the second and third requirements are satisfied in this case. The parties' dispute in this appeal centers on whether the state court has already decided an issue

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[2]The district court also held that Missouri's two-year statute of limitations barred Tolefree's state law claims. Tolefree does not appeal this part of the district court's order.

identical to an essential element of Tolefree's Title VII action. Tolefree also argues that he was denied a full and fair opportunity to litigate his claim at the administrative level because of ineffective representation.

In a traditional Title VII case, the plaintiff must first make out a prima facie case of discrimination. The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the plaintiff's termination. Finally, the plaintiff has an opportunity to prove that the legitimate reasons that the defendant offered were merely a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981). In this case, the Board has already determined that Tolefree was, in fact, terminated for a legitimate reason (two unsatisfactory ratings). Because the Board found that the unsatisfactory ratings were justified, Tolefree is estopped from proving that the ratings were merely a pretext for discrimination.

Alternatively, a plaintiff can establish a violation of Title VII under a "mixed motives" theory by showing that discrimination played a part in the challenged employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). Once the plaintiff has shown that race was a motivating factor, the defendant can escape liability only by proving that it would have made the same decision in the absence of discrimination. Id.

The City contends that it was entitled to summary judgment because the state court order precluded Tolefree from proving an essential element of his "mixed motives" case. We disagree. Because the Board never considered the discrimination or retaliation issues, the state court order cannot estop Tolefree from arguing that his discharge was based on a mixed motive. Even though the Board found a legitimate reason for Tolefree's dismissal, its opinion does not foreclose the possibility that the city's action was in part racially motivated. Under Price

Waterhouse, Tolefree need only show that race was a motivating factor in his termination and that, absent discrimination, he would not have been fired. Price Waterhouse, 490 U.S. at 244-245. Such a conclusion would not be inconsistent with the Board's holding.

We reject the City's assertion that our decision in Swapshire should control this case. In Swapshire, a Missouri state court had affirmed the St. Louis Board of Police commissioners' decision upholding a black police officer's termination. We held that the prior state court proceedings collaterally estopped the plaintiff from bringing a civil rights action against the City of St. Louis in federal court. Swapshire, 865 F.2d at 949-52. Unlike Tolefree, however, the plaintiff in Swapshire "did in fact place the discriminatory punishment question into issue before the state court." Id. at 950. Tolefree did not do so. Tolefree is not barred, therefore, from attempting to make out a case of discrimination in federal court because the discrimination issue has not been litigated previously.

III.

The City's final contention is that even if Tolefree's claim is not collaterally estopped, it is barred on res judicata grounds. While collateral estoppel precludes relitigation of previously litigated issues, res judicata prevents relitigation of the same claim. See Jacobs v. Corley, 732 S.W.2d 910, 913 (Mo. App. 1987).

> Missouri courts hold that four concurring elements must be present to support res judicata: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the parties to the cause of action; and (4) the identity of the quality or capacity of the person for or against whom a claim is made.

Id. (citing Eugene Alper Constr. Co., Inc. v. Joe Garavelli's, 655 S.W.2d 132, 136 (Mo. App. 1983)). Although the third and fourth elements are satisfied, res judicata does not apply in this case because Tolefree's current claim is not the same as his previously litigated claim.

Tolefree's hearing before the Board and subsequent state court appeal were nothing more than steps in an administrative challenge of his dismissal. The City's charter limited the Board's involvement to a consideration of whether Tolefree's dismissal was justified. On appeal from this administrative determination, Tolefree could not raise new issues before the state court. Under Missouri law, in the absence of "alleged irregularities in procedure or of unfairness by the agency," the reviewing state court may consider only evidence that was before the Board unless "such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency." Mo. Rev. State. Sec. 536.140; see also Benton-Hecht Moving & Storage v. Call, 782 S.W.2d 668, 669 (Mo. App. 1989) (judicial review of administrative decision "is upon the record made before the administrative body with deference to its fact finding function"). In appealing the board's decision to the state court, therefore, Tolefree was pursuing only the administrative remedies available to him. At no time during the previous actions did Tolefree assert any claim whatsoever against the City; he was merely seeking to have his dismissal reversed.

In contrast, Tolefree now asserts that the City discriminated against him in violation of Title VII. While it is true that the underlying subject matter of Tolefree's prior and current actions centers on his dismissal from the City's fire department, "no claim in the second action has been litigated in the first." Id. at 913. This is not, as the City claims, simply a case in which the

plaintiff is attempting to relitigate the same claim under a different legal theory. See Dreckshage v. Community Fed. Savings & Loan, 641 S.W.2d 831, 834 (Mo. App. 1982). Rather, Tolefree's Title VII claim is of an entirely different nature from the earlier appeal of his termination. It is, therefore, not barred by the res judicata doctrine.

Contrary to the City's argument, Brown v. St. Louis Police Dept., 691 F.2d 393, 396 (8th Cir. 1982) is inapposite here. In *Brown*, we held that a plaintiff who brought an original action against his employer in state court should have asserted his civil rights claims at that time. Id. Essential to our holding in Brown was our statement that the discrimination issue "could and should have been raised in the state proceedings under Mo. Ann. State. Sec. 84.040 (Vernon 1982)." Id. Section 84.040 prohibits the St. Louis police commissioners from removing any policeman from office for any reason other than "the fitness of unfitness of such a person." The City has not pointed to any corresponding statute relating to the Kansas City Fire Department under which Tolefree "could and should have" raised his claims of discrimination in state court.

Moreover, Tolefree was challenging his dismissal on two fronts. At the same time that he was challenging his unsatisfactory ratings before the Board, he was pursuing his claims of discrimination with the Kansas City Department of Human Relations under the Administrative Code, Code of General Ordinances of Kansas City, Article IX, Secs. 26.201 - 26.214. We cannot, therefore, accuse Tolefree of failing to raise the discrimination issue at the administrative level; he simply raised it in an appropriate forum other than the Personnel Appeals Board. Tolefree did not appeal the Human Rights Department's decision in state court, so he is not now precluded from bringing a Title VII action in federal court.

VI.

Because we conclude that Tolefree's Title VII action is not barred by collateral estoppel or res judicata, we need not reach Tolefree's claim that his case was not fully and fairly litigated before the Board. We reverse and remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

ELVIS TOLEFREE,
Appellant,

v.

CITY OF KANSAS CITY, MISSOURI,
Appellee.

No. 91-2002

United States District Court,
For the Eighth Circuit
May 19, 1992

Elvis Tolefree appeals from the district court's order granting summary judgment to the City of Kansas City, Missouri ("the City") in Tolefree's employment discrimination action. We reverse and remand.

I.

The City hired Tolefree as a fire fighter in August 1978. Tolefree's supervisors reviewed his work annually on an "Employee Performance Report" form, which required the supervisor to rate the employee's quality of work, work output, work habits, safety, personal relations, adaptability, and supervisory skills, and to give the employee a "general evaluation" rating.[1] Tolefree's "general evaluation" ratings were as follows:

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[1]From 1979 until 1981, the possible ratings in each category were: outstanding, above average, average, below average, and unsatisfactory. In 1982, the ratings changed to optimal, better, satisfactory, and unsatistactory.

August	1979	Average
August	1980	Average
July	1981	Average
August	1982	Satisfactory
July	1983	Unsatisfactory
March	1984	Satisfactory
July	1984	Satisfactory
July	1985	Satisfactory
August	1986	Unsatisfactory
November	1986	Unsatisfactory

In April 1984, Tolefree filed a charge of race discrimination with the City's Department of Human Relations. He alleged that because he is an African-American, he was denied training as an extra driver, subjected to derogatory remarks, instructed to remain at his rig during fires, and sanctioned for insubordination. The disposition of this charge is not clear from the record.

In September 1986, Tolefree again filed a charge against the City with the City's Department of Human Relations and with the Equal Employment Opportunity Commission (EEOC). His 1986 charge asserted that his August 1986 "unsatisfactory" rating was in retaliation for filing the 1984 discrimination charge. After Tolefree was again rated "unsatisfactory" in November 1986, the City discharged him effective December 9, 1986, citing lack of diligence and poor work quality. Tolefree then amended his September 1986 charge to allege that his discharge was also retaliatory.

At Tolefree's request, the City's Personnel Appeals Board ("the Board") reviewed the propriety of his discharge. The Board held a hearing, at which Tolefree was represented by his union's attorney. The sole issue at the hearing was whether the City's dismissal of Tolefree was justifiable. Neither party raised the issues of racial discrimination and retaliation. In a brief

written decision, the Board held that Tolefree was properly terminated under Section 16.5 of the Personnel Rules and Regulations, which stated that "[a]ny employee receiving a rating of UNSATISFACTORY for two (2) consecutive times shall be dismissed by the appointing authority for unsatisfactory service." The Board found that "although [Tolefree] appears to be an intelligent articulate person, he has allowed his own values and concepts of his job to create performance problems in his dealing with a structured fire fighting system accepted by the Fire Department, the Union and the management."

In accordance with internal administrative procedures, Tolefree next appealed to the City Manager, who concluded that the Board's decision was supported by the record. Tolefree then filed a petition for review with the state circuit court in Jackson County. In an October 1987 order, the state court summarily affirmed the Personnel Board and the City Manager without opinion. Tolefree did not appeal the state court's order.

After receiving a right to sue letter from the EEOC in November 1989 on his 1986 charge against the City, Tolefree filed this action in the district court in February 1990. His complaint alleged racial discrimination and retaliation in violation of Title VII, 42 U.S.C. Section 2000e-2 and the Missouri Human Rights Act, Mo. Rev. Stat Secs. 213.055, et. seq. One year later, the City moved for summary judgment, arguing that the prior state court order barred Tolefree's claims under the doctrine of collateral estoppel. The district court agreed, relying on our opinion in Swapshire v. Baer, 865 F.2d 948 (8th Cir. 1989), and on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The district court noted that an employer will prevail in a Title VII action if it can prove that it would have discharged the plaintiff regardless of his race. Price Waterhouse, 490 U.S. at 242. The court concluded that:

> [a]s the prior litigation determined that plaintiff was terminated for legitimate nondiscriminatory reasons, it is this finding which plaintiff is estopped from denying. Because it is an essential element of plaintiff's case to prove that defendant terminated plaintiff for other than a legitimate nondiscriminatory reason summary judgment must be entered on this claim.

The court reached the same result with respect to Tolefree's claim of retaliatory discharge.[2]

II.

Federal courts must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." Kremer v. Chemical Const. Corp., 456 U.S. 461, 466 (1982). Under Missouri law, Tolefree would be collaterally estopped from pursuing his Title VII claim if four conditions were met. First, the issue decided in the prior adjudication must be identical to the issue presented by his Title VII action. Second, the prior adjudication must have resulted in a judgment on the merits. Third, Tolefree must have been a party or in privity with a party to the prior adjudication. Fourth, Tolefree must have had a full and fair opportunity to litigate the issue in the prior suit. Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 719 (Mo. 1979).

There is no question that the second and third requirements are satisfied in this case. The parties' dispute in this appeal centers on whether the state court has already decided an issue

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[2]The district court also held that Missouri's two-year statute of limitations barred Tolefree's state law claims. Tolefree does not appeal this part of the district court's order.

identical to an essential element of Tolefree's Title VII action. Tolefree also argues that he was denied a full and fair opportunity to litigate his claim at the administrative level because of ineffective representation.

In a traditional Title VII case, the plaintiff must first make out a prima facie case of discrimination. The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the plaintiff's termination. Finally, the plaintiff has an opportunity to prove that the legitimate reasons that the defendant offered were merely a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981). In this case, the Board has already determined that Tolefree was, in fact, terminated for a legitimate reason (two unsatisfactory ratings). Because the Board found that the unsatisfactory ratings were justified, Tolefree is estopped from proving that the ratings were merely a pretext for discrimination.

Alternatively, a plaintiff can establish a violation of Title VII under a "mixed motives" theory by showing that discrimination played a part in the challenged employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). Once the plaintiff has shown that race was a motivating factor, the defendant can escape liability only by proving that it would have made the same decision in the absence of discrimination. Id.

The City contends that it was entitled to summary judgment because the state court order precluded Tolefree from proving an essential element of his "mixed motives" case. We disagree. Because the Board never considered the discrimination or retaliation issues, the state court order cannot estop Tolefree from arguing that his discharge was based on a mixed motive. Even though the Board found a legitimate reason for Tolefree's dismissal, its opinion does not foreclose the possibility that the city's action was in part racially motivated. Under Price

Waterhouse, Tolefree need only show that race was a motivating factor in his termination and that, absent discrimination, he would not have been fired. Price Waterhouse, 490 U.S. at 244-245. Such a conclusion would not be inconsistent with the Board's holding.

We reject the City's assertion that our decision in Swapshire should control this case. In Swapshire, a Missouri state court had affirmed the St. Louis Board of Police commissioners' decision upholding a black police officer's termination. We held that the prior state court proceedings collaterally estopped the plaintiff from bringing a civil rights action against the City of St. Louis in federal court. Swapshire, 865 F.2d at 949-52. Unlike Tolefree, however, the plaintiff in Swapshire "did in fact place the discriminatory punishment question into issue before the state court." Id. at 950. Tolefree did not do so. Tolefree is not barred, therefore, from attempting to make out a case of discrimination in federal court because the discrimination issue has not been litigated previously.

III.

The City's final contention is that even if Tolefree's claim is not collaterally estopped, it is barred on res judicata grounds. While collateral estoppel precludes relitigation of previously litigated issues, res judicata prevents relitigation of the same claim. See Jacobs v. Corley, 732 S.W.2d 910, 913 (Mo. App. 1987).

> Missouri courts hold that four concurring elements must be present to support res judicata: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the parties to the cause of action; and (4) the identity of the quality or capacity of the person for or against whom a claim is made.

Id. (citing Eugene Alper Constr. Co., Inc. v. Joe Garavelli's, 655 S.W.2d 132, 136 (Mo. App. 1983)). Although the third and fourth elements are satisfied, res judicata does not apply in this case because Tolefree's current claim is not the same as his previously litigated claim.

Tolefree's hearing before the Board and subsequent state court appeal were nothing more than steps in an administrative challenge of his dismissal. The City's charter limited the Board's involvement to a consideration of whether Tolefree's dismissal was justified. On appeal from this administrative determination, Tolefree could not raise new issues before the state court. Under Missouri law, in the absence of "alleged irregularities in procedure or of unfairness by the agency," the reviewing state court may consider only evidence that was before the Board unless "such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency." Mo. Rev. State. Sec. 536.140; see also Benton-Hecht Moving & Storage v. Call, 782 S.W.2d 668, 669 (Mo. App. 1989) (judicial review of administrative decision "is upon the record made before the administrative body with deference to its fact finding function"). In appealing the board's decision to the state court, therefore, Tolefree was pursuing only the administrative remedies available to him. At no time during the previous actions did Tolefree assert any claim whatsoever against the City; he was merely seeking to have his dismissal reversed.

In contrast, Tolefree now asserts that the City discriminated against him in violation of Title VII. While it is true that the underlying subject matter of Tolefree's prior and current actions centers on his dismissal from the City's fire department, "no claim in the second action has been litigated in the first." Id. at 913. This is not, as the City claims, simply a case in which the

plaintiff is attempting to relitigate the same claim under a different legal theory. See Dreckshage v. Community Fed. Savings & Loan, 641 S.W.2d 831, 834 (Mo. App. 1982). Rather, Tolefree's Title VII claim is of an entirely different nature from the earlier appeal of his termination. It is, therefore, not barred by the res judicata doctrine.[3]

IV.

Because we conclude that Tolefree's Title VII action is not barred by collateral estoppel or res judicata, we need not reach Tolefree's claim that his claim was not fully and fairly litigated before the Board. We reverse and remand to the district court for further proceedings consistent with his opinion.

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[3]Brown v. St. Louis Police Dept., 791 F.2d 393, 396 (8th Cir. 1982), contrary to the City's argument, is inapposite here. In Brown, we held that a plaintiff who brought an original action against his employer in state court should have asserted his civil rights claims at that time. Id. Tolefree's state court action, however, was statutorily limited to a review of the Board's administrative decision holding his dismissal. Mo. Rev. Stat. Section 536.140. As discussed in the text of this opinion, Tolefree did not assert an independent claim against the City until he reached federal court.

ELVIS TOLEFREE,
Plaintiff,

vs.

CITY OF KANSAS CITY, MISSOURI,
Defendant.

No. 90-0201-CV-W-5

In the United States District Court For The
Western District of Missouri
Western District

April 2, 1991

Before this Court is defendant's motion for summary judgment. Plaintiff's complaint alleges that he was terminated from employment with the City of Kansas City, Missouri, fire department because of his race and in retaliation for filing a claim with the Equal Employment Opportunity Commission. Defendant asserts four grounds in support of this motion. Because the second and fourth grounds dispose of this case, grounds one and three will not be discussed. For the following reasons, defendant's motion for summary judgment will be granted.

For its second ground, defendant argues that plaintiff's claims are barred by collateral estoppel. Defendant bases this argument on the fact that plaintiff's termination was at issue in an administrative hearing which held the termination proper. This administrative decision was upheld in the Circuit Court of Jackson County Missouri. Tolefree v. Personnel Board of the City of Kansas City, CV87-15821 (Jackson County Cir. Ct. Oct. 29, 1987).

In a case with facts similar to the instant case, the Eighth Circuit found that Missouri judicial affirmation of administrative personnel decisions is to be given preclusive effect where the usual conditions for application of the doctrine of collateral estoppel are met. Swapshire v. Baer, 865 F.2d 948, 950-52 (8th Cir. 1989). For collateral estoppel to bar relitigation of an issue, four criteria must be met: first, the issue decided in the prior adjudication must be identical to the issue presented in the later suit; second, the prior adjudication must have resulted in a judgment on the merits; third, the party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and, fourth, the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior lawsuit. Swapshire, 865 F.2d at 951.

Plaintiff argues that collateral estoppel does not apply because the issues before the state court are not identical to the issues in the instant case and because plaintiff did not have a full and fair opportunity to litigate the issue in the prior suit.

It is true that the prior litigation did not address plaintiff's present claims of discriminatory and retaliatory termination. The former case looked only at whether the decision to terminate plaintiff from the fire department was appropriate because of plaintiff's unsatisfactory ratings.

In a claim for discriminatory discharge, however, a verdict must be returned in favor of a defendant if it is proved that the defendant would have discharged the plaintiff regardless of his race. Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 109 S.Ct. 1775, 1786 (1989) (Title VII claim alleging sex discrimination); Chaffin v. Rheem Mfg. Co., 904 F.2d 1269, 1272 (8th Cir. 1990). As the prior litigation determined that plaintiff was terminated for legitimate nondiscriminatory reasons, it is this

finding which plaintiff is estopped from denying. Because it is an essential element of plaintiff's case to prove that defendant terminated plaintiff for other than a legitimate nondiscriminatory reason, Id., summary judgment must be entered on this claim.

This same element is necessary in a claim of retaliatory discharge. Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985). As such, plaintiff is estopped from denying a legitimate nondiscriminatory reason for his discharge under a retaliation theory.

Missouri also requires a civil rights claimant to prove that an employer did not have a legitimate nondiscriminatory reason for the actions of which a plaintiff complains. Midstate Oil v. Missouri Comm'n on Human Rights, 679 S.W.2d 842, 846 (Mo. 1984) (en banc); Comm'n on Human Rights v. City of Sikeston, 769 S.W.2d 798, 801 (Mo.Ct.App. 1989). Thus, for the reasons noted above, plaintiff's claims under the Missouri Human Rights Act must also fail.

Plaintiff also argues that he was not provided a full and fair opportunity to litigate the issues in the prior lawsuit. This argument is without merit. Plaintiff was represented by counsel initially and on appeal. At no point was plaintiff prevented from developing a complete record. All of the evidence in the record indicates a full and fair adversarial litigation of the issues presented by plaintiff.

Additionally, plaintiff's claims under state law are barred by the two-year statute of limitations. Mo.Rev.Stat. Section 213.111. Plaintiff was terminated on December 9, 1986. This action was not filed until February 27, 1990. The filing of a timely Title VII action does not, as plaintiff argues, toll the running of the statute of limitations on plaintiff's state law claims. Hill v. John Chezik Imports, 797 S.W.2d 528, 530 (Mo.Ct.App. 1990).

Finally, this Court does not fathom defendant's delay in

moving for summary judgment. This case was filed more than a year prior to defendant's motion for summary judgment. The facts on which summary judgment is granted were at all times in the possession of defendant. No discovery could have turned up any additional facts which would have strengthened or weakened defendant's position. For these reasons, this Court finds that plaintiff should not bear the usual responsibility for costs. Fed.R.Civ.P. 54(d).

ORDERED that defendant's motion for summary judgment is granted. It is further

ORDERED that judgment is entered in favor of defendant and against plaintiff, each party to bear its own costs.

APPENDIX C

ELVIS TOLEFREE,
Appellant,

v.

CITY OF KANSAS CITY, MISSOURI,
Appellee.

No. 91-2002
United States District Court,
For the Eighth Circuit
July 9, 1992

This matter is before the Court on appellee's petition for rehearing with suggestion for rehearing en banc. It is hereby ordered that the petition for rehearing by the panel is granted, and the panel's opinion is vacated. A new opinion will be issued at a future date. This ruling makes the suggestion for hearing en banc moot, and no action will be taken on that suggestion.

ELVIS TOLEFREE,
Appellant,
v.
CITY OF KANSAS CITY, MISSOURI,
Appellee.

No. 91-2002
United States District Court,
For the Eighth Circuit
February 25, 1993

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

APPENDIX D

CITY OF KANSAS CITY, MISSOURI CHARTER SECTION 125:

Removal, demotion or suspension; employee's right to review by personnel board.

Any permanent employee of the classified service of the city who shall be removed or reduced in rank or suspended by an appointing authority shall have the right to have such action of the appointing authority reviewed by the personnel board upon filing with the director of personnel within ten (10) calendar days after the effective date of such removal, reduction in rank or suspension, a written request for review by said personnel board, whereupon the personnel board shall grant a public hearing within thirty (30) calendar days after the filing of such request. Reviews by the board of such removals, reductions in rank or suspensions shall be conducted under such rules and regulations as the board may adopt. The director of personnel shall make such investigation and reports as the board may direct. The board shall have the power to inquire into all the facts and circumstances pertaining to such removal, reduction in rank or suspension of such employee and for that purpose shall have the power to administer oaths and may compel the production of books and papers by subpoenas duces tecum and may compel the attendance of witnesses by subpoena at the request of either the employee involved, the appointing authority or any member of the board. If the board decides by the greater weight of the evidence that the employee was wrongfully discharged or reduced in rank or suspended, then the board may reinstate such employee in his former position, or if consented to by the appointing authority for some other vacant position, may direct

the appointment of such employee to such other vacant position in the classified service of the same or equivalent class or grade as his previous position, and, within the sole discretion of the board, with or without loss of or partial loss of pay, and may make such other orders as the board may deem necessary to effectuate the purposes of the provisions of this section.

The board shall report all decisions in writing to the city manager, to the director of personnel, to the appointing authority and to the employee involved, and except as hereinafter provided, all decisions shall be subject to review by the city manager who shall have the power to affirm, change, modify or reverse decisions of the board, and upon so doing shall notify, in writing, the personnel board, the director of personnel, the appointing authority and the employee affected thereby. No review, however, shall be made by the city manager of any decisions of the personnel board except on the record of such proceedings and unless a written request therefor shall be made of the city manager by the employee or appointing authority involved, within ten (10) calendar days after the giving of written notification of the decision of the personnel board to such employee or appointing authority; provided, however, that each decision of the city manger shall be final and conclusive; provided further, that each decision of the board shall be final and conclusive in each case where the board shall find that such removal, reduction in rank or suspension was influenced or caused by either the religious or the political opinions or affiliations of such employee and such decision of the board shall not be subject to review by the city manager.

All notices required to be given under the provisions of this section shall be deemed sufficient if delivered in person or if mailed to the last known post office address of the employee or appointing authority involved.

APPENDIX E

ELVIS TOLEFREE
Plaintiff,

v.

THE PERSONNEL BOARD OF THE CITY OF KANSAS CITY, MISSOURI
Defendant.

No. CV87-15821
In the Circuit Court of Jackson County, Missouri
October 27, 1987

After reviewing the transcript and all exhibits and hearing oral arguments of the Attorneys involved the Court finds, that, under the law, the decision of the City Manager and the Personnel Appeals Board should be and is in all respects affirmed.

Costs against Appellant.

_____

Judge's Signature

ELVIS N. TOLEFREE,
Appellant,

v.

KANSAS CITY, MISSOURI,
Respondent.

No. 960
Before the Personnel Board of Kansas City, Missouri
March 10, 1987

DECISION

This case, heard on February 10, 1987, is a request by Elvis N. Tolefree, Appellant, for review and hearing by the Personnel Board of a disciplinary action taken against him by representatives of Respondent, his employer. The Appellant was present and represented by attorney. The Respondent was represented by attorney.

FINDINGS OF FACT

The Board finds that the Appellant had been employed since August 17, 1978, by Respondent and while working as a Fire Fighter in the Fire Fighting Division of the Fire Department for Respondent, he was terminated effective December 9, 1986, for receiving two consecutive unsatisfactory ratings on Employee Performance Reports, the first one on annual report followed by a special rating in 90 days; that, Appellant produced poor quality work and lacked diligence in work which resulted in the first rating and failed to improve resulting in the second rating. Appellant stated he believed he received inadequate training and that others didn't understand him but produced no evidence thereof. Appellant admitted he had "problems with the system".

CONCLUSIONS OF LAW

The Board finds, believes and concludes from the evidence that Appellant received two consecutive unsatisfactory performance ratings, and that Sec. 16.5 of the Personnel Rules and Regulations states, "Any employee receiving a rating of UNSATISFACTORY for two (2) consecutive times shall be dismissed by the appointing authority for unsatisfactory service;" and although the Appellant appears to be an intelligent articulate person, he has allowed his own values and concepts of his job to create performance problems in his dealing with a structured fire

fighting system accepted by the Fire Department, the Union and the management; THEREFORE, the Board concludes that the Respondent's action in dismissing the Appellant was appropriate and such action is SUSTAINED; however, the Board encourages the Appellant to apply for some other position or positions with the Respondents.

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

ORIGINAL

Supreme Court, U.S.
FILED
AUG 19 1993
OFFICE OF THE CLERK

NO. 92-2022

IN THE
UNITED STATES SUPREME COURT
October Term, 1992

CITY OF KANSAS CITY, MISSOURI,
Petitioner,

vs.

ELVIS TOLEFREE,
Respondent.

RESPONDENT ELVIS TOLEFREE'S RESPONSE TO PETITION FOR CERTIORARI

Larry Delano Coleman, P.C.
Larry Delano Coleman #27575
SCARRITT BUILDING
818 Grand Avenue. # 600
Kansas City, MO 64106
(816) 221-8600
(816) 221-9025 (fax)
ATTORNEY FOR RESPONDENT

Date: August 19, 1993

I. MATERIAL MISSTATEMENT OF FACTS

Under the heading "FACTS", the City of Kansas City, Missouri (hereinafter "City" or "Petitioner") misstates and/or omits salient and material facts, which if they had been mentioned would cause its petition to implode upon itself. While the specter of such a phenomenon may account for the omission of those facts, such an omission also runs the risk that the petition may be granted "in the mistaken belief that the issue presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case". Rule 15.1.

The City fails to mention the following salient facts:

1. That in April 1984, Tolefree filed a charge of race discrimination with the City's Department of Human Relations, in which he alleged that because he is an African-American, he was denied training as an extra driver, subjected to derogatory remarks, instructed to remain at his rig during fires, and sanctioned for insubordination. The disposition of this charge is not clear from the record. (App. 2).

2. That in September 1986, Tolefree again filed a charge against the City with the City's Department of Human Relations and with the Equal Employment Opportunity Commission (EEOC). His 1986 charge asserted that his August 1986 "unsatisfactory" rating was in retaliation for filing the 1984 discrimination charge. (App.2)

3. That at the same time that Tolefree was challenging his unsatisfactory ratings before the Board, he was pursuing his claims of discrimination with the Kansas City Department of Human Relations under the Administrative Code,

> Code of General Ordinances of Kansas City, Article IX, Secs. 26.201-26.214. Tolefree raised the discrimination issue at the administrative level in an appropriate forum other than the Personnel Appeals Board. (App. 8)

The Eighth Circuit, indeed, exhaustively examined the distinctions between the separate administrative routes provided by the City's Department of Human Relations and that provided by the City's Personnel Department, of which the Personnel Appeals Board was an advisory component, final authority being vested in the City Manager. Tolefree, of course, pursued both of these. One, the Human Relations Department, was created specifically to deal with matters involving "discriminatory employment practices", Sec. 26.211, such as race and retaliation. The latter, the Personnel Appeal Board, however, was created to deal with other personnel issues not involving "discriminatory employment practices". As the Eighth Circuit correctly noted, "The City's charter limited the Board's involvement to a consideration of whether Tolefree's dismissal was justified." (App. 7). The Eighth Circuit's analysis was substantially aided through the means of "Supplemental Briefs and Appendices" and two separate "Petitions for Rehearing with Suggestions for Rehearing En Banc", and Responses thereto from the Respondent, filed by the City and Tolefree, at the Eighth Circuit's request.

Should the entire record come up before this Court, especially "Administrative Code, Code of General Ordinances of Kansas City, Article IX, Secs. 26.201-26.214" (App.8)

which the City strategically and tactfully did not include in its appendix, it will become apparent why no action was ever taken on Tolefree's race and retaliation claims by the City's Human Relations Department. This was because the City Attorney's Office, which provides "legal assistance" to the director of human relations, Sec. 26.210, would have been engaged in a conflict of interest, since it must represent discrimination claimants before that entity, Sec. 26.204; yet, defend the City before the Personnel Board. Hence, it would have been in the anomalous position of representing Tolefree, against the City, on his race and retaliation claims, in the Human Relations Department, and representing the City against Tolefree at the Personnel Appeals Board.

The City, of course, could have set this forth in its "FACTS", and it could have set forth the relevant ordinance in its appendix. But, of course, such would have detonated the very implosion that it feared. Hence, its silence. For this court's convenience referenced portions of the City's civil rights ordinance are appended hereto.

The facts as presented by the City misstate and/or omit salient and material facts. For this reason alone the petition for writ of certiorari should be denied.

II. MIS-APPLICATION OF LAW

A. Brown v. St. Louis Police Dept. is still good law

Notwithstanding two (2) different opinions in the instant case, 964 F. 2d 803 (8th Cir. 1992), vacated, 975 F. 2d 434 (8th Cir. 1992), re-issued, 980 F. 2d 1171 (8th Cir. 1992), Brown v. St. Louis Police Dept., 691 F. 2d 393 (8th Cir. 1982) is still good law in the Eighth Circuit. Tolefree did not overturn, nor limit the application of Brown. Therefore, the City's argument "flee[s] when none pursueth", Lev.26:17.

Because Brown is still good law in the Eighth Circuit, it is consistent with all of the cases cited in Parts I, II and III of the City's argument. There is no conflict between Brown and any of the City's cited cases in parts I, II, and III. On the contrary, Tolefree is a case unique to its own facts:

> We cannot, therefore, accuse Tolefree of failing to raise the discrimination issue at the administrative level; he simply raised it in an appropriate forum other than the Personnel Appeals Board. Tolefree did not appeal the Human Rights Department's decision in state court, so he is not precluded from bring a Title VII action in federal court.

980 F. 2d at 1175-1176; (App. 8). Elvis Tolefree luckily exhausted every avenue available to him. He did all that the law required. He could have done no more than he did.

There being no inconsistency between Brown and Tolefree in the Eighth Circuit, as that circuit has reconciled both cases in its two decisions. And, since Brown is homologous to the authority from the other circuits, with which the City contends that Tolefree conflicts, it is apparent that

as Tolefree is reconcilable with Brown, Tolefree, is likewise reconcilable with the other cases. In fine, Tolefree, is a case of limited utility, unique to its own facts, fully reconcilable with Brown and related cases.

B. Tolefree is consistent with Elliott

The instant case is actually supported by University of Tennessee v. Elliott, 478 U.S. 788 (1986). Hence, it is difficult to see for what purpose the City has cited it in part IV of its argument. In Elliott, a black employee was deemed to be entitled to a trial de novo on his Title VII claim, even though he had gone through an exhaustive state administrative proceeding, during which the state administrative law judge determined that the actions taken by the employer were not racially motivated. The District Court in Elliott, like the District Court below, granted summary judgment to the employer holding that the state administrative finding was entitled to preclusive effect. Also like this case, the Sixth Circuit Court of Appeals reversed the District Court. This Court, then, in reliance upon Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), and Chandler v. Roudebush, 425 U.S. 840 (1976), reasoned that Congress intended Title VII claimants to have a trial de novo, and that a state administrative finding did not have a preclusive effect on a Title VII claim in federal

court, affirming the Sixth Circuit's ruling with respect to Title VII.

Tolefree is even stronger than Elliott. For one thing, Elliott presented evidence in the "state administrative proceeding" that the "charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge." 478 U.S. at 791. Tolefree did not. Neither race nor retaliation were ever presented. Secondly, there was no doubt but that Elliott was proceeding under the "Tennessee Uniform Administrative Procedures Act", 478 U.S. at 790, in a state administrative proceeding. However, the City's Personnel Appeals Board is not a "state agency". The Supreme Court of Missouri has concluded that the Missouri legislature has not accorded to its political subdivisions the power to create a cause of action for the violation of an anti-discrimination ordinance and to create an agency to determine and enforce a violation of that ordinance. Yellow Freight Systems v. Mayor's Com'n, 791 S.W. 2d 382, 387 (Mo. banc 1990). Thus, the Personnel Appeals Board decision in Tolefree is, as a matter of Missouri law, not entitled to the same weight that the state administrative proceeding in Elliott was accorded.

Thus, because Elliott enjoys continuing vitality, there is no need to accord certiorari in Tolefree.

III. CONCLUSION

The City's Petition for Certiorari fails to expose a split between the circuits and fails to demonstrate a legitimate or rationale basis for the grant of certiorari. As such, the petition should and must be denied.

WHEREFORE, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 19th day of August 1993 to:

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(816) 274-1676
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LARRY DELANO COLEMAN, ESQ.

ARTICLE IX. CIVIL RIGHTS ORDINANCE OF KANSAS CITY, MISSOURI*

Sec. 26.201. Definitions.

For the purposes of this article, and sections herein, the following definitions shall apply unless the context explicitly indicates otherwise:

(1) *Board:* Civil rights board.

(2) *City:* City of Kansas City, Missouri.

(3) *Complaint:* A verified written statement of facts and circumstances, including dates, times, places and names of persons involved in any alleged violation of any provision of this article.

(4) *Complainant:* Any person claiming injury by the alleged violation of this article.

(5) *Department:* Department of human relations.

(6) *Director:* The director of the human relations department.

(7) *Handicapped person:*

With respect to employment: Means a handicapped person who is otherwise qualified and with reasonable accommodation, can perform the essential functions of the job in question.

Generally: Any person who:

(a) Has a physical or mental impairment which substantially limits one (1) or more major life activities:

(b) Has a record of such impairment; or

(c) Is regarded as having such an impairment.

(8) *Parties:* The parties to any proceeding or hearing held pursuant to this article shall be the complainant and the respondent.

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*Editor's note—Section 1 of 2nd C.S. Ord. No. 53581, adopted Mar. 26, 1982, repealed former art. IX, §§ 26.201—26.214, the city's fair housing act, derived from Ord. No. 35218, adopted Apr. 19, 1968, and enacted in lieu thereof a new art. IX, §§ 26.201—26.214. Art. II½, §§ 26.74—26.77.1, inclusive, enacted by C.S. Ord. No. 32546 on July 21, 1967, was repealed by Ord. No. 35217, passed Apr. 19, 1968.

(6) *Conciliation.* To attempt to eliminate any unlawful practice or any alleged violation of the terms of this article by means of conference, conciliation, persuasion and negotiation, and to assist parties to enter into conciliation agreements.

(7) *Prehearing conference.* At least ten (10) working days prior to any hearing before the board, the director may call a conference of all parties concerned in any alleged violation of this article for the purpose of attempting to conciliate the same. Such conference shall be informal, no record of the proceeding shall be kept and no testimony shall be given or received at any hearing before the board concerning endeavors to conciliate any alleged violation of this article.

(8) *Dismiss complaints.* To dismiss any complaint upon finding such to be frivolous or without merit on its face.

(9) *Reject affirmative action programs.* To reject any affirmative action program for failure to conform to the rules adopted applicable to such. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.204. Complaint procedure.

Any person claiming injury by an allegedly unlawful discriminatory practice may, by himself or by his attorney, make, sign and file a verified written complaint with the director on forms provided by the director, which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the director for the investigation of the complaint.

Any complaint filed pursuant to this article must be so filed within one hundred eighty (180) days after the alleged unlawful discriminatory practice was committed.

After the filing of any complaint, the director shall promptly serve through certified mail (return receipt requested) a copy thereof upon the respondent and all other persons deemed to be necessary parties, and make prompt investigation in connection therewith.

After the filing of any complaint, or whenever the director has reason to believe that an unlawful discriminatory practice has been

committed, the director shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for crediting the allegations of the complaint, the director shall cause to be issued and served upon all parties written notice of such determination.

If it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the director shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion.

If in the judgment of the director the circumstances so warrant, he may at any time after the filing of the complaint endeavor to eliminate such allegedly unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of such allegedly unlawful discriminatory practice in the future and may contain such further provisions as may be agreed upon by the director and the respondent. The director shall not disclose what has transpired in the course of such endeavors and shall not make or maintain a public record of such endeavors as the term "public record" is defined at section 610.010(4) RSMo.

If the respondent and the director agree upon conciliation terms, the director shall compile such and serve upon the complainant a copy of the proposed conciliation agreement. If the complainant agrees the terms are fairly set out in the agreement or fails to object to such agreement within fifteen (15) calendar days after its service upon him, the director shall issue an order embodying such conciliation agreement and shall serve a copy of such agreement upon all parties to the proceedings.

If the director believes that he has failed to eliminate an allegedly unlawful discriminatory practice by such means, he shall cause to be issued and served a written notice of a failure to eliminate the alleged discriminatory practice by conference, conciliation and persuasion.

In case of failure to eliminate such discriminatory practice, the director shall cause to be issued and served a written notice, to-

gether with a copy of such complaint as it may be amended, requiring the respondent to answer the charges of such complaint at a public hearing before a panel of at least three (3) members of the board sitting as the board.

The case in support of the complaint shall be presented before the panel by the city attorney. No member of the board panel shall participate in the investigation, and the aforesaid endeavors at conciliation shall not be received in evidence. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.205. Action by the board.

(a) *Hearing Date To Be Set.* Upon receipt from the director of a written complaint or of a written request for appeal made within the specified time, the board shall, within ten (10) days of receipt thereof, set a date upon which it will hold a hearing and shall notify all parties of the date thereof. Hearings shall be set not less than thirty (30) nor more than ninety (90) days after receipt by the board of a request for appeal.

(b) *Notice of Hearing.* A notice of hearing shall be served upon the parties at least twenty (20) days prior to the date of the hearing. Such notice shall state the caption and number of the case and the time and place of hearing. A copy of the complaint as amended shall be attached to each such notice.

(c) *Record of Proceedings.* The board shall cause all proceedings before it to be suitably recorded and preserved, provided, that no transcription of such record shall be made except at the request and expense of the party desiring such transcription. Any party may have a copy of all or any part of the record of any proceeding upon payment of proper charges therefor.

(d) *Hearing Procedure.* The hearing shall be conducted in the manner provided in chapter 536 RSMo. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.206. Refusal to permit inspection or failure to obey subpoena—Punishment.

If any person fails, neglects or refuses to obey all the terms of any subpoena or subpoena *duces tecum* issued by the civil rights appeal

Sec. 26.208. Confidentiality.

No documents which have been submitted nor anything which has been said or done during the course of a conciliation endeavor or as a result of an affirmative action program submission shall be made public or used as evidence in any subsequent proceedings without the written consent of the parties concerned, except when such statements or documents are a public record as defined at 610.025 RSMo or except when such statements or documents are used as evidence before the civil rights board. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.209. Injunctive relief.

If at any time after the filing of a complaint alleging a discriminatory practice under this article the director determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the civil rights board may enter in such proceeding, the director may recommend that the city, with representation by the city attorney's office, apply to the circuit court in any county where the alleged discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, for an order requiring the respondent to show cause why he or she should not be enjoined from doing or procuring such act to be done. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.210. City attorney to assist director.

The city attorney shall render to the director of human relations such legal assistance as may be necessary in the administration and enforcement of the provisions of this article, and shall present the cases set for hearing by the director. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.211. Discriminatory employment practices.

Sections 26.211 through 26.214 of the Code of General Ordinances apply to discriminatory employment practices which occur within the corporate limits of the City of Kansas City, Missouri. (2nd C.S. Ord. No. 53581, 3-26-82)